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STATE OF MICHIGAN
IN THE SUPREME COURT

CHARLIE B. HOBSON and,
MARY L. HOBSON, husband and wife,

Plaintiffs/Appellees,

vs.

INDIAN HARBOR INSURANCE COMPANY, a foreign corp., XL INSURANCE AMERICA, INC., a foreign corp., and XL INSURANCE COMPANY OF NEW YORK, INC., a foreign corp.,

Defendants/Appellants,

-and-

WILSON INVESTMENT SERVICE AND CONSTRUCTION, INC., WILSON INVESTMENT SERVICE , CRESCENT HOUSE APARTMENTS, CRESCENT HOUSE APARTMENTS, LLC, W-4 FAMILY LIMITED PARTNERSHIP, W-4 FAMILY, LLC AND JAMES P. WILSON,

Defendants/Appellees

Supreme Court No.: 151447
Court of Appeals No.: 316714
Wayne County CC No.: 12-008167-CK

PLAINTIFFS-APPELLEES' BRIEF IN OPPOSITION TO INSURER-DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

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STATEMENT REGARDING JURISDICTION

Plaintiffs acknowledge that this Court may, in its discretion, review a decision of the Michigan Court of Appeals. MCR 7.301(A)(2). Plaintiffs contend that the Court should not exercise that jurisdiction but should, instead, deny the Application.

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STATEMENT OF QUESTION PRESENTED

I. **SHOULD THE APPLICATION FOR LEAVE TO APPEAL BE DENIED?**

Plaintiffs/Appellees answer "YES".

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COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Background Facts

Indian Harbor Insurance Company or its affiliates[1] sold a Commercial General Liability insurance policy (Ex. 2)[2] to W-4 Family Limited Partnership ("Wilson", "the insured", or "the landlord"[3]). The insured business of Wilson was "APARTMENT BUILDINGS" (Ex. 2, p. 1).

Plaintiffs Charlie Hobson and Mary Hobson were tenants in one of the apartment buildings owned and operated by Wilson and covered by the Indian Harbor Insurance Policy (Ex. 3, Complaint, ¶¶ 3, 6, 7). On July 17, 2008, during the insurance policy coverage period, a fire broke out, causing serious injuries and losses to the Hobsons (Ex. 3, ¶¶ 10, 11). The injuries were caused by the negligence of the landlord (Ex. 3, ¶ 9)[4].

When Plaintiff's counsel contacted the Insurer pre-suit, it declined coverage, claiming that the Tenant Agreement required the tenants (Hobsons) to purchase

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[1] Suit was filed against three affiliated insurers: Indian Harbor, XL Insurance America, Inc., and XL Insurance Company of New York, Inc. The three are collectively referred to as "Indian Harbor" or "the Insurer".

[2] The Brief filed by the Insurer contains lettered exhibits. To avoid confusion, the exhibits to this Brief are numbered and include the full insurance policy (Pl. Ex. 2).

[3] Several related entities which operate apartment buildings, called "Wilson" for simplicity, were defendants in the personal injury action but are not involved in this declaratory judgment action.

[4] According to claims materials (Ex. 4), the fire occurred when the Wilson "building manager drifted off to sleep while preparing a meal".

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renter's insurance (Ex. 5). The Insurer has since abandoned that basis for denying coverage.

When Wilson sought protection, the Insurer again disclaimed coverage (Ex. 6). This time, it cited the "pollution" exclusion, the basis for its current argument. With this refusal of coverage, the Insurer closed its file (Ex. 7).

As a result, Plaintiffs filed their personal injury action against Wilson (Ex. 3) and a declaratory judgment action against the Insurer. Having been abandoned by the Insurer, Wilson defended the tort action at its own expense with its own counsel (Ex. 10, transcript of May 24, 2013, pp. 15-16).

The Insurer filed a motion for summary disposition offering two arguments. First, it argued that the Hobsons could not file a declaratory judgment action against it, an argument it has abandoned on appeal. Second, it argued that, because the personal injury Complaint alleged smoke inhalation, as one of the injuries caused by the fire, its duty to defend or indemnify Wilson was abrogated by a "pollution" endorsement. Plaintiffs responded with their Answer to the Insurer's motion and their counter-motion for summary disposition (Ex. 9).

B. The Insurance Policy

The insurance policy covers the negligence liability of the Insured, Wilson. It provides coverage for liability arising from a fire, as Defendant's counsel readily acknowledged (Ex. 10, Tr. 5/24/13, p. 15) ("Yes", "If they would have just been

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burned, they would have been covered"). The Insurer claimed, however, that since the fire produced smoke, coverage was abrogated by the "pollution" endorsement. The contract provisions bearing on the dispute are as follows.

1. The Insuring Agreement

The scope of the insurance sold by Appellant is described in Section I A, "BODILY INJURY AND PROPERTY DAMAGE LIABILITY":

> "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which the insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit that may result."

The meaning of "bodily injury" is found in "SECTION V – DEFINITIONS":

> "'Bodily injury' – means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

It is unquestioned that Plaintiffs sustained "bodily injury" and filed a "suit" seeking "bodily injury" "damages". The Insuring Agreement obligates the Insurer

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to fulfill two promises: to "pay those sums that the insured becomes legally obligated to pay", and the "duty to defend the insured against any suit seeking those damages".

2. The Pollution Exclusion In The Body of the Policy

The CGL insurance policy contains, in its body, a "Pollution" exclusion [exclusion 2(f), pp. 2-3]. The exclusion applies to " 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'" [exclusion (f)(1)(a)]. "However, this sub-paragraph does not apply to... 'bodily injury' or 'property damage' arising out of heat, smoke or fumes from a 'hostile fire'" [exclusion (f)(1)(a)(iii)].

This case involves a "hostile fire" as that term is defined in the insurance policy. Thus, the "pollution" exclusion in the body of the insurance policy does not avoid coverage, since the reach of the exclusion does not extend to injuries to Plaintiffs "arising out of heat, smoke, or fumes" - - i.e. those injuries remain covered.

3. The Inapplicability of the Pollution Exclusion to Damage By Fire On Rented Property

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On page 5 of the policy [Bates No. HOBSON00031], following the listing of the exclusions, the insurance policy language makes the pollution and other exclusions inapplicable to fire damage to leased premises:

> "Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits of Insurance."

4. The Pollution Endorsement

There is a separate pollution endorsement invoked by Indian Harbor. It provides:

> "This insurance does not apply to:
>
> > "'Bodily injury' or 'property damage which would not have occurred in whole or part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time."

The Definitions section defines "pollutants":

> "'Pollutants' mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

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The "Total Pollution Exclusion Endorsement" (Bates No.HOBSON000047), which is the foundation of the Insurer's argument, purports to "modif[y] insurance under the ... Commercial General Liability Coverage... Exclusion f...". However, it does not retract the limitation by which exclusions "do not apply to damage by fire to premises while rented to you". This language remained in effect, making the pollution exclusion [in whatever form] inapplicable to fire damage on leased premises.

C. The Circuit Court Summary Disposition Ruling

The summary disposition motion was argued before Hon. Kathleen MacDonald, Wayne County Circuit Court Judge, on May 24, 2013 (Ex. 10). By that time, Wilson, fending for itself, reached a settlement with Plaintiffs (Tr. 5/24/13, pp. 3-4). At the conclusion of the argument, the Court denied the Insurer's motion, and granted that of Plaintiffs, regarding insurance coverage (Tr. 5/24/13, p. 15).

With this ruling, the Court allowed Wilson to pursue its claim for attorney fees incurred in defending the personal injury action (Tr. 5/12/13, p. 16). Consequently, the Order resolving the coverage dispute was not a final order (Ex. 11).

D. The Appellate Decision

The Insurer filed an Application for Leave to Appeal, seeking interlocutory appellate review. By Order of December 20, 2013 (Ex. 12), the Court of Appeals

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denied the Application, "for failure to persuade the Court of the need for immediate appellate review".

The Insurer then sought Supreme Court review. In lieu of granting leave, the Court remanded for consideration as on leave granted (Ex. 14).

On appeal, the Court of Appeals affirmed (Ex. 1). The lead opinion, with which all Judges concurred (Judges O'Connell, Borello and Gleicher) concluded that Plaintiffs' claim was not excluded by the pollution endorsement, because that was not the nature of the claims (Ex. 1, p. 5):

> "...[C]onstruing the exclusion in the context of the policy as a whole, it is clear that, under the plain terms of subsection (f), plaintiffs did not allege that they sustained injuries that 'would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of' a pollutant as that term is defined in the policy. Here, plaintiffs did not allege that their injuries were caused by a pollutant. Instead, plaintiff's alleged that negligence on the part of the insured's employees gave rise to their injuries. Specifically, in their complaint in this case, plaintiffs alleged in relevant part that employees of the insured 'set a fire due to negligence... causing... Plaintiffs the injuries and damages set forth in the complaint in [the companion case against the Wilson defendants]' (emphasis in the original). Indeed, the insurance defendants even acknowledge in their brief on appeal that 'plaintiffs were allegedly injured in a fire, which occurred in the apartment complex

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> plaintiffs were residing in...' (emphasis in the original). Thus, the alleged injuries were not caused in whole or in part by a pollutant that was discharged, dispersed, seeped, migrated, released or escaped. Rather, the injuries allegedly arose from the negligence of the insured, which resulted in a fire."

The Court also considered the language of the pollution endorsement which excluded only "discharge, dispersal, seepage or migration, release or escape" of a pollutant (Ex. 1, p.6). Citing Sixth Circuit authority, the Court of Appeals found the endorsement inapplicable for this second reason (Ex. 1, pp. 6-7):

> "...[P]laintiffs did not allege that they suffered injuries caused in whole or in part by the seepage or migration of a pollutant – i.e. smoke. Here, plaintiffs were injured when a fire started at the complex where they were located. They were physically on the premises when the fire started. Their injuries were not allegedly caused by smoke that passed, flowed, or oozed gradually into the apartment complex. Instead, the smoke was there with the fire when the fire started. Nor were plaintiffs' injuries alleged to have been caused by smoke that migrated into the apartment complex. Nothing suggested that smoke spread by seepage from an area or site of containment into a larger environment. The fire was never alleged to have been contained somewhere outside the apartment complex before the fire and its smoke spread or seeped into the building where the plaintiffs were injured. Rather, the smoke was attached to the fire

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> that started inside the building where plaintiffs were physically located. There was no migration. There was no seepage.
>
> * * *
>
> In this case, plaintiffs allegedly suffered injuries because of the negligence on the part of the insured that resulted in a fire. Plaintiffs did not allege injuries that were caused in whole or in part by the discharge, dispersal, release, seepage, migration, or escape of a pollutant. Defendant's contention that the pollutant was the basis for plaintiffs' claim is inaccurate. Plaintiffs were allegedly injured by when the fire and smoke engulfed them. It did not pollute them. Accordingly, the trial court did not err in denying the insurance defendant's motion for summary disposition."

Judge O'Connell, concurring, identified another reason why the trial court reached the correct result. According to the insurance policy, the pollution exclusion was inapplicable to fires on the leased premises (concurrence, p. 2):

> "The insurance defendants' entire argument regarding the change in the pollution clause constitutes smoke and mirrors. The final paragraph of Section I – Coverages, 2. Exclusions, on the fifth page of the policy, provides that '[e]xclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with the permission of the owner.' The parties' endorsement changed

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> subdivision f., which falls alphabetically between c. and n. By the plain language of the policy, exclusion f. does not apply in this case because the Hobson's claim concerns 'damage by fire to premises.'".

Plaintiffs had offered additional reasons why the trial court reached the correct decision. Because of its decision, the Court of Appeals found no need to address more reasons why there was insurer liability.

E. The Application For Supreme Court Review

The Insurer has now applied for Supreme Court review. The gist of its argument is that the Court of Appeals did not properly construe and apply the contract language - - even though the appellate court said it did exactly that (Ex. 1, pp. 2, 4-6). For the reasons which follow, Plaintiffs contend that the lower courts correctly applied the contract language in accord with settled contract jurisprudence; that the trial court and Court of Appeals had alternative grounds to reach the same outcome; and that this case and the issue it presents do not warrant extraordinary review by a Supreme Court of last resort.

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ARGUMENT

I. THE APPLICATION FOR LEAVE TO APPEAL SHOULD BE DENIED

Reduced to its essence, the Insurer's plea for Supreme Court review is grounded on the premise that the Court of Appeals did something other than apply the precise language of the insurance policy. That is simply not so. The appellate court could not have been more clear in its approach. As explained at p. 2 of the Opinion, the Court simply construed the contract as written, applying that language to the critical facts of the case (Opinion, pp. 5-7). The Application should be denied, particularly since it is founded on a mischaracterization of the nature of the Court of Appeals Opinion (sub-section A, infra). Beyond that, the ultimate outcome is substantively correct for several reasons (sub-section B).

A. THIS APPEAL, INVOLVING A ROUTINE QUESTION OF CONTRACT INTERPRETATION, DOES NOT WARRANT REVIEW BY THE SUPREME COURT OF LAST RESORT

Defendant repeatedly relies on the mantra that contracts are to be construed and applied as written. There is no quarrel at all over that proposition. In the last two decades, it has been repeated by this Court more times than one can easily count. See e.g. Rory v Continental Ins Co, 476 Mich 457 (2005).

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The problem with the Insurer's position is that the Court of Appeals did exactly what this Court's jurisprudence teaches. The appellate court looked to the contract language and applied it to the facts. The Court fulfilled the precise role expected of an intermediate appellate court: applying settled law to unique facts. There is no occasion for this Supreme Court to interfere with the decision made by the Court of Appeals, doing exactly what it was supposed to do.

The more limited role of this Court is reflected in the leave criteria of MCR 7.302(B). To paraphrase, the leave criteria call upon this Court to reserve its limited decisional resources for rare cases presenting important and unresolved legal issues of widespread application. There is nothing unique or novel about the adage that unambiguous contracts are to be applied in accord with their ordinary meaning. That proposition has been repeated so many times as to demonstrate that this would not be a suitable candidate for review, even if that had been the basis for the appellate decision - - which it was not.

The most that might be said is that two alternative interpretations are offered by the parties, based on the unique facts of this case. That the outcome is fact-dependent presents yet another reason why it lacks the broad application which is ordinarily required for Supreme Court review.

Beyond the facial unsuitability of this case for Supreme Court review, there is no clear issue of law presented. In fact, as discussed in sub-section B, there are

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several alternative reasons why the courts below reached the right result. Those reasons are largely unique to the contract language and facts of this case. Even if there were some legal issue to be discerned, this is not the uncomplicated "vehicle" to best address that issue.

When all is said and done, this case involves routine aspects of contract law that are beyond serious dispute and were expressly recognized and applied by the Court of Appeals. For this and other reasons the case does not warrant review by this State's court of last resort. The Application should be denied.

B. APPLYING SETTLED PRINCIPLES OF CONTRACT LAW, THE LOWER COURTS CORRECTLY HELD THAT THE INSURANCE POLICY SOLD BY DEFENDANTS COVERED THE LIABILITY OF ITS INSURED TO PLAINTIFFS

In abandoning Wilson, the Insurer apparently took the position that, since some of the alleged injuries were arguably excluded due to "smoke", this meant that it had no duty at all to defend or indemnify. The Insurer's position is non-meritorious for several reasons, any one of which supports the decisions below.

1. <u>There Is An Inherent Conflict Between Two Different Pollution Exclusions</u>

The "pollution" exclusion in the body of the insurance policy [exclusion (f)(1)] exempts from the exclusion, i.e. provides coverage for [(f)(1)(a)(iii)]:

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> "'Bodily injury' or 'property damage' arising out of heat, smoke or fumes from a 'hostile fire'".

The policy also contains the separate pollution endorsement on which the Insurer relies. Either the two "pollution" provisions are in conflict with each other or they are harmonious. In either event there is coverage.

As a starting point, contracts are to be construed in a fashion that would render each provision meaningful and would render neither nugatory. Knight Enterprises, v Fairlane Car Wash, Inc, 482 Mich 1006 (2008); Klapp v United Insurance, 468 Mich 459, 468 (2003); Woodington v Shokooki, 288 Mich App 352, 374 (2010). The Insurer's proposed construction would nullify Section (f)(1)(a)(iii) and must therefore be rejected.

Absent nullification, the Insurer's construction would posit two "pollution" provisions which are in irreconcilable conflict. That approach would not assist Indian Harbor.

Where there is ambiguity, which cannot be resolved by resort to extrinsic evidence, the contract is to be construed against the party which drafted it, the insurer. Wilkie v Auto-Owners Ins Co, 469 Mich 41, 62 (2003); Arco Industrial Corp v American Motorists Ins Co, 448 Mich 395, 403 (1995); ACIA v DeLaGarza, 433 Mich 208, 214 (1989).

An insurance contract is ambiguous, "when its words may reasonably be understood in different ways". Raska v Farm Bureau Ins Co, 412 Mich 355, 362

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(1982); Farm Bureau Ins Co v Nikkel, 460 Mich 558, 566 (1999). Where there is ambiguity as to the breadth of the insurance coverage, it must be resolved against the insurer in favor of the insured. Zurich Insurance v Rombough, 384 Mich 228, 232-233 (1970); Francis v Scheper, 326 Mich 441, 448 (1949); Graham v Peerless Life Insurance Co, 368 Mich 335, 343 (1962); Auto-Owners Ins Co v Leefers, 203 Mich App 5, 11 (1963).

Moreover, different provisions of a contract are to be construed in a manner which makes them harmonious, giving due effect to each. Leon v Detroit Harvester Co, 363 Mich 366, 370 (1961); Burton v Travelers Ins Co, 341 Mich 30, 32 (1954); Murphy v Seed-Roberts Agency, 79 Mich App 1, 8 (1977); Associated Truck Lines v Baer, 346 Mich 106, 110 (1956).

That result can be accomplished in this case by construing the two provisions together. Per the endorsement, injuries caused by "discharge, dispersal, seepage, migration, release, or escape" are excluded. However, "injuries arising out of heat, smoke, or fumes from a 'hostile fire'" are not excluded.

2. The Construction Urged By The Insurer Would Nullify The Pollution Exclusion In The Body of the Insurance Policy Which Provides Coverage For A "Hostile Fire"

To accept the Insurer's theory, a liability insurance policy which facially covers "fire" damage, really only means non-existent smoke-less fires. Its argument is akin to arguing that a policy insuring negligence liability can exclude

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coverage when the insured failed to exercise reasonable care. The deference accorded to parties' right to contract does not allow a flim-flam like that attempted by Defendant in arguing that "fire" coverage is abrogated whenever the fire produces "smoke".

As Judge O'Connell noted at the beginning of his concurring opinion, "Where there is fire, there is smoke". Defendant's argument, if accepted, would nullify completely the fire liability insurance itself. While Defendant criticizes the trial judge for noting the logical impact of the Insurer's argument, this is an accurate application of contract law.

The Insurer's proposed construction would nullify Section (f)(1)(a)(iii) and must therefore be rejected. Knight Enterprises; Klapp; Woodington.

3. By The Language of the Insurance Policy, the Pollution Exclusion Does Not Apply to Fire Claims On Rental Premises

A separate reason why the courts below got it right is provided by the analysis of Judge O'Connell. As he correctly notes, the pollution exclusion (f) - - in both original and supplemental forms - - is limited by the language found in HOBSON 00031: "Exclusions e through n do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner". As Plaintiffs alleged "damage by fire" to their rented premises, exclusion (f), "do[es] not apply".

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4. Even If The Endorsement Relied On By Defendant Applied, The Complaint Alleges Injuries Covered By The Policy

The exclusion on which Defendant relies, even if otherwise applicable, applies only to claims due to "the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'". It does not abrogate coverage for other injuries.

The very purpose of an insurance policy is to insure. An additional, and related, rule of construction is that doubts regarding coverage must be resolved in favor of a finding that coverage exists. Connecticut Indemnity Co v Nestor, 4 Mich App 578, 581 (1966); Shelby Mutual Insurance Co v United States Fire Insurance Co, 12 Mich App 145, 149 (1968); Squires v Hayes, 13 Mich App 449, 452 (1968); Arrigo's Fleet Service, Inc v Aetna, 54 Mich App 484, 494 (1974).

In the instant case, the Court of Appeals correctly held that under the language of the endorsement, some or all of Plaintiff's claims were not barred by the endorsement (Ex. 1, p. 5): There is no error in that analysis.

> "Given this backdrop and construing the exclusion in the context of the policy as a whole, it is clear that, under the plain terms of subsection (f), plaintiffs did not allege that they sustained injuries that 'would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of' a pollutant as that term is defined in the policy. Here, plaintiffs did not allege that their injuries

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> were caused by a pollutant. Instead, plaintiff's alleged that negligence on the part of the insured's employees gave rise to their injuries. Specifically, in their complaint in this case, plaintiffs alleged in relevant part that employees of the insured 'set a fire due to negligence... causing... Plaintiffs the injuries and damages set forth in the complaint in [the companion case against the Wilson defendants]'. Indeed, the insurance defendants even acknowledge in their brief on appeal that 'plaintiffs were allegedly injured in a fire, which occurred in the apartment complex plaintiffs were residing in...'. Thus, the alleged injuries were not caused in whole or in part by a pollutant that was discharged, dispersed, seeped, migrated, released or escaped. Rather, the injuries allegedly arose from the negligence of the insured, which resulted in a fire." (emphasis by Court of Appeals).

Exactly. Since Plaintiffs' claims were not confined to excluded claims, the pollution endorsement does not abrogate the entirety of the Insurer's duties.

5. The Injury Did Not Arise From "Discharge, Dispersal, Seepage, Migration, Release Or Escape Of A Pollutant"

The insurance policy's pollution endorsement is triggered only where there is discharge, dispersal, seepage, migration, release or escape" of a "pollutant". The Court of Appeals correctly looked to the meanings of the quoted terms and determined that the allegations of the Complaint did not allege any of these (Ex. 1, pp. 6-7).

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The policy itself insures against fires and the burn injuries they cause, and if the intent had been to exclude fire injuries - - the very risk insured against – it would be no difficult matter to say so clearly and unequivocally. As the terms used in the endorsement show, "pollutants" refers to something that can be *discharged, dispersed, seeped, migrated, released or escaped.* In other words, the policy language clearly contemplates pollution as a substance that was confined to an area, object or thing and was then either released or somehow moved away from where it was confined. No other logical construction of the policy as a whole makes sense. Sample applicable definitions out of the Merriam-Webster Dictionary are attached as Exhibit 13.

Exhibit 13 shows that *discharge* means to relieve of a charge, a load or burden or to unload. Stated differently, pollution is appropriately identified as something that should have been contained, but was not properly contained and is now released for discharge. It is pollution of this nature which is excluded from coverage under Defendants' insurance policy. Again, *fire* clearly does not fit this definition. It is defined as "*the phenomenon of combustion manifested in light, flame, and heat...*" or "*destructive burning...*".

"Disperse" means to cause to break up, spread, evaporate of vanish. Again, this definition does not have anything to do with a *fire*. *Seepage* has been defined as a process of oozing or a fluid that has moved from one area of containment to

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another. Likewise, *migrate* means to move from one country, place or locality to another which pollution may actually do. This is not so of an emergent fire because the emergent fire in question was never contained in one specific country, place or locality before it moved to another. Additionally, *release* means to set free from restrain, confinement or servitude. While a fire is a phenomenon of combustion, its very nature is uncontained and therefore unrestrained and unconfined and as such cannot be *released* as defined by Defendant's endorsement.

The Court of Appeals applied the ordinary meaning to the undefined terms in the "discharge..." clause. There was no error in doing so.

6. The Insurer Breached The Duty To Defend, As Some of the Pleaded Claims Are Not Excluded, Even Under Defendant's Construction of the Insurance Policy

The nuances of the policy language need not be explored. The Complaint, which the Insurer refused to defend, pleads causes of action which are covered, even under Defendant's proposed interpretation.

The pollutant endorsement does not vitiate the policy in full. Instead, it only excludes, "bodily injury... damages which would not have occurred... but for pollutants [smoke]." Damages not attributable to smoke are not excluded and

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remain within the duty to defend. The courts below reached the right result.[5]

This insurance policy, like most primary policies, imposes two distinct duties: the duty to indemnify and the duty to defend. Western Casualty v Coloma, 140 Mich App 516, 520 (1985); Van Hollenbeck v Ins Co of North America, 157 Mich App 470, 479-489 (1987). The duty to indemnify arises only at the end of the case, when an adjudication has been made about the facts, legal theories, and damages. At that time, when the case is over, the duty to indemnify is limited to claims that have been conclusively determined to fall within the coverage or indemnity provisions.

In contrast, the duty to defend arises at the very outset of the case, when a claim is initially made, before the facts have been fleshed out, the damages determined, or the theories of recovery finally fixed. In practice, then, the duty to defend must be exercised before the merits of the claim, and before the duty to indemnify, are resolved. For this practical reason, the duty to defend is broader than the duty to indemnify, and extends to claims which **might** ultimately be determined to fall within the indemnity coverage. St. Paul v Michigan Mutual, 469 Mich 905 (2003).

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[5] To the extent that this Brief presents rationales different than that invoked by the trial judge, they are nonetheless properly considered by this Court. An Appellee may urge alternative reasons why the trial judge reached the right result. People v Podlaszuk, 480 Mich 866 (2007); Middlebrooks v Wayne County, 446 Mich 151, 166 (1994); Menendez v Detroit, 337 Mich 476, 483 (1953).

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One facet of the duty to defend is to compare the facial allegations of the Complaint against the policy. If any allegations arguably fall within the coverage provided, the duty to defend is triggered, even if other claims clearly fall outside the duty to indemnify. Dochod v Central Mutual Ins Co, 81 Mich App 63, 67 (1978); Radenbaugh v Farm Bureau, 240 Mich App 134, 137 (2000).

A second facet of the duty is the obligation to look beyond the pleadings to see if coverage is **possible**. If so, the duty to defend again arises. Shepard Marine v Maryland Casualty Co, 73 Mich App 62, 65 (1976); Radenbaugh, 240 Mich App at 137-138. Thus, a duty to defend exists where there is uncertainty, or where coverage is "arguable". American Bumper & Mfg Co v Hartford Fire Ins Co, 452 Mich 440, 450-451 (1996); Royce v Citizens Ins Co, 219 Mich App 537, 543 (1996). If there is any doubt as to whether the claims against the insured include liability under the policy, the doubt must be resolved in favor of the insured. Protective National Ins Co v Woodhaven, 438 Mich 154, 159 (1991); American Bumper, 452 Mich at 455.

The duty to defend has a third component—the duty to investigate to determine the exact nature of the claims against the insured. Koski v Allstate Ins Co, 456 Mich 439, 445, fn. 5 (1998):

> "An insurer's duty to defend, then, includes the duty to investigate and analyze whether the third party's claim against the insured should be covered."

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The duty to defend continues until the covered claims are sorted out from uncovered claims. As this Court held in American Bumper, 452 Mich at 455:

> "As explained earlier, insurers owe a duty to defend until the claims against the policy holder are confined to those theories outside the scope of coverage under the policy."

In short, under American Bumper, if any of the claims actually asserted, or which (looking beyond the claimant's nomenclature) could be asserted, are covered or arguably are covered, then the duty to defend attaches. This is so, even if other claims, or more expensive claims, are not covered. An insurer which breaches the duty to defend is liable for the attorney fees incurred in defense, and any good faith settlement negotiated by the insured. Elliott v Casualty Association of America, 254 Mich 282, 287-288 (1931); Alyas v Gillard, 180 Mich App 154, 160 (1989); Palmer v Pacific Indemnity, 74 Mich App 259 (1977); Cooley v Mid-Century Ins Co, 52 Mich App 612, 616 (1974).

Here, the Insurer is at least responsible for injuries and damages not caused by smoke or those not caused by "discharge, dispersal, etc. The Complaint pleads these covered damages. The Insurer breached its duty to defend by abandoning the Insured despite these allegations and without conducting an investigation. For this reason, the courts below did not err.

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The Insurer misses the point in arguing otherwise on the basis of Vanguard Ins Co v Clarke, 438 Mich 463 (1991). That case considered, but did not decide, whether to adopt, a "concurrent causation" doctrine. Instead, the Vanguard court simply construed and applied the language of the insurance policy.

This case does not involve multiple "causes". Instead, it involves distinct classes of injuries. Applying the plain language, as Vanguard teaches, the exclusion applies only to certain injuries, and not to others. Even if smoke-inhalation damages might arguably be excluded, this does not change the fact that the Complaint alleges injuries and damages that would occur without smoke. Nor does it change the case law which requires an Insurer to defend until covered and uncovered claims are sorted out, including this Court's decision in American Bumper. The courts below got it right.

In the final analysis, Indian Harbor sold insurance whose very purpose was to cover fire liability of the insured for injuries caused by fire. Its creative attempt to avoid its undertaking because the fire caused "smoke" is factually and legally without merit. The Application for Leave to Appeal should be denied.

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RELIEF SOUGHT

WHEREFORE Plaintiffs-Appellees CHARLES B. HOBSON and MARY L. HOBSON pray that this Honorable Court deny the Application for Leave to Appeal.

Respectfully submitted,

BENDURE & THOMAS

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